Supreme Court, U.S.
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No. 90-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ORSCHELN BROTHERS TRUCK LINES, INC., BARRY S. SCHERMER, TRUSTEE, ASSIGNOR AND CARRIERS TRAFFIC SERVICE, INC., ASSIGNEE,

Petitioners,

v.

ZENITH ELECTRONICS CORPORATION f/k/a ZENITH RADIO CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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September 5, 1990

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QUESTION PRESENTED FOR REVIEW

Under the "filed-rate" doctrine, must the Interstate Commerce Commission permit a motor carrier to recover so-called undercharges from a shipper where the carrier, in seeking to secure new business, falsely represents to the shipper that a new lower tariff had been properly filed and the shipper relies on that misrepresentation in tendering freight for carriage?

LIST OF PARTIES

All of the interested parties are not listed at page (i) of the petition. In addition to petitioners and respondent, the Interstate Commerce Commission actively participated as a party in the proceedings below. There are no parent companies, subsidiaries (except wholly-owned subsidiaries), or affiliates to be listed for the corporations named as parties.

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ZENITH ELECTRONICS CORPORATION f/k/a ZENITH RADIO CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Zenith respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's judgment and opinion in this case. The opinion below is reported at 899 F.2d 642 (1990).

STATEMENT OF THE CASE

The petition adequately relates the procedural history below but fails to inform this Court about the facts of the case.

The decision of the Interstate Commerce Commission (Pet. App. 52a-69a), affirmed by the court below, discloses that in the year 1981, Orscheln was engaged

in transporting television cabinets from Zenith's Indiana cabinet facility to its Missouri television assembly plant under a class rate tariff of $6.78 per cwt. Zenith stopped using Orscheln services in late 1981 because Orscheln's rates were no longer competitive. (Pet. App. 15a, 57a).

Orscheln thereupon sought a meeting with Zenith to reestablish the business relationship and proposed a new mutually acceptable rate of $4.25 per cwt. which Orscheln promised to file and publish with the Commission. Shortly thereafter, Orscheln officials confirmed that the new rate had been filed, informing Zenith's representative "that a tariff supplement to ICC MWB 226-D providing a rate of $4.25 per cwt., at 12,000 pounds minimum weight, had been filed under emergency provisions of the Commission and was in effect" (Pet. App. 6a, 7a, 15a, 53a, 54a, 57a).

In reliance on the representation, Zenith again gave Orscheln television cabinet business and Orscheln billed and collected for its services in accordance with the new rate. However, Orscheln's representation that the tariff supplement had been filed was false. In fact, Orscheln did not issue its supplement until several months later. It became effective in February 1982, after the shipments in controversy were made. (Pet. App. 58a).

A similar incident occurred in September 1982 in connection with shipments of television receivers from Missouri to Zenith distributors in various states. Prior to any actual shipments, Orscheln officials informed Zenith that certain negotiated rates had been published in "ICC OBTL 400, Item 971 . . . and that the negotiated rates were in effect" (Pet. App. 16a, 53a, 54a, 58a). Zenith's subsequent shipments were billed

and paid for at the negotiated rates, but once again Orscheln's representation proved to be false. The negotiated rates were never filed. (Pet. App. 60a).

These two incidents give rise to Orscheln's $43,267 claim for the alleged undercharges that are the subject of its petition for writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Conflict With This Court's Maislin Decision.

The fraudulent conduct of the carrier in this case factually distinguishes the case from this Court's "filed rate" decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, ___ U.S. ___, 111 L.Ed.2d 94 (Decided June 21, 1990). In *Maislin*, this Court specifically noted that "the Commission determined that there was no intentional or fraudulent conduct in this case" and further that " '[w]hile Quinn may not have taken appropriate steps to legalize the quoted rates, it has not been demonstrated that this occurred as a result of any intent to engage in unlawful conduct' " (111 L.Ed.2d at 112, Note 12; 107, Note 7).

In the present case, the record shows that on two occasions Orscheln falsely represented to Zenith that tariffs reflecting negotiated rates were actually on file and in effect in order to induce Zenith to begin giving Orscheln new business. While neither the Commission nor the court below expressly rested its decision on the presence of fraud, that tortious conduct remains an indelible part of the record and clearly distinguishes the case from the *Maislin* decision.*

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* Respondent also challenged the reasonableness of the tariff rate on which petitioner based its undercharge claim. However, the Interstate Commerce Commission did not rule on this issue and therefore the issue was not before the Court below.

Respondent recognizes that in *Maislin* this Court observed that the "risk of intentional misconduct . . . has never been considered sufficient to justify a less stringent interpretation of §10761" (111 L.Ed.2d at 112, Note 12). On the other hand, it can be said with equal accuracy that actual fraud of the type here involved has never been considered an insufficient ground for granting relief under 49 U.S.C. 10701(a) and 49 U.S.C. §10704(b)(1). The question has not been authoritatively decided one way or the other. See *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 583, Note 13 (1981) ("... We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct.").

Respondent submits that in the absence of any conflict between the federal courts, this question—whether the "filed-rate" doctrine immunizes a carrier from the consequences of its own fraud—does not warrant an exercise of certiorari jurisdiction.

II. Legislation Has Been Introduced In Congress That Would Authorize The Interstate Commerce Commission To Substantially Modify Application Of The "Filed-Rate" Doctrine In Tariff Undercharge Cases.

As a result of widespread dissatisfaction with the *Maislin* decision, legislation has been introduced in the Senate that would stay civil actions brought to collect tariff rate charges in addition to those originally billed and collected, pending a determination of the reasonableness of this practice by the Interstate Commerce Commission. (S. 2933). We are advised that the Committee on Commerce, Science and Transportation recommended passage of the legislation in its report filed with the Senate on August 30, 1990. Leg-

islation having similar effect is also pending in the House of Representatives where it is being considered by the Committee on Public Works and Transportation. (H.R. 3243).

Given this level of Congressional interest, it would be improvident for this Court to grant certiorari in yet another undercharge case without first allowing Congress reasonable time to respond legislatively to the Court's *Maislin* ruling. As the Court commented in *Maislin*, "[i]f strict adherence to §§10761 and 10762 as embodied in the filed rate doctrine has become an anachronism . . ., it is the responsibility of Congress to modify or eliminate these sections." (111 L.Ed.2d at 114).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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